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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FLOYD L. MORROW, *et al.*,
Plaintiffs,

v.

CITY OF SAN DIEGO, *et al.*,
Defendants.

Case No. 11-cv-01497-BAS-KSC
**ORDER DENYING MOTION TO
DISMISS**
[ECF No. 146]

The City of San Diego (“City”) brings this Motion to Dismiss arguing: (1) Plaintiffs have not been diligent in pursuing their claim as evidenced by a late filing of a class certification motion, (2) the Court should issue a terminating sanction for Plaintiffs’ violation of the Court’s March 27, 2017, discovery order, and (3) the Court should enter a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). For the reasons discussed below, the Court **DENIES** this Motion.

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1 **I. DUE DILIGENCE AND CLASS CERTIFICATION MOTION**

2 On March 6, 2012, this Court issued a scheduling order requiring Plaintiffs to
3 file a motion for class certification by October 5, 2012. (ECF No. 36.) Before that
4 deadline was reached, upon motion of the City, the Court agreed to abstain from
5 adjudicating Plaintiffs’ claims and remanded the action to the San Diego Superior
6 Court, retaining jurisdiction of Plaintiffs’ federal claim if Plaintiffs made an
7 “England” reservation and the claim was not mooted in the state court action. (ECF
8 Nos. 51, 61.)

9 The state case proceeded, Plaintiffs made an “England” reservation, and their
10 federal claim was not mooted in the state action. Thus, on August 2, 2016, this Court
11 issued an order finding that abstention was no longer appropriate and ordering the
12 parties to meet with Magistrate Judge Crawford for a case management conference.
13 (ECF No. 132.) Judge Crawford issued a second scheduling order requiring that all
14 pretrial motions, including those addressing *Daubert* issues, be filed by June 5, 2017.
15 (ECF No. 135.) The order was silent on the issue of a class certification motion. On
16 April 8, 2017, Plaintiffs filed a Motion for Class Certification, which the Court has
17 denied. (ECF Nos. 143, 147.)

18 The City argues the Motion for Class Certification violated the original
19 scheduling order and the delay merits dismissal. The Court disagrees. The Court
20 granted the City’s motion for abstention before the original class certification
21 deadline was reached. Plaintiffs could not move forward with this case because, at
22 the behest of the City, the Court had ordered that the case could not go forward. The
23 City has failed to demonstrate any lack of diligence on the part of Plaintiffs and thus
24 the Motion on this ground must fail.

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26 **II. DISCOVERY SANCTIONS**

27 On December 28, 2016, the City brought motions to compel Plaintiffs to sit
28 for their depositions and to order Plaintiffs to respond to interrogatories. (ECF Nos.

1 136, 137.) Judge Crawford granted the motions, ordering that Plaintiffs make
2 themselves available for depositions within thirty days of the order and respond to
3 the interrogatories with full and complete responses within fifteen days of the order.
4 (ECF Nos. 140, 141.) Judge Crawford also denied the City’s request for monetary
5 sanctions. (ECF Nos. 140, 141.)

6 The Plaintiffs did apparently sit for their depositions and file responses to the
7 interrogatories. The City attaches the responses and Mr. Morrow’s deposition
8 transcript to its Motion. (ECF Nos. 146-4, 146-5.) However, the City complains that
9 the responses to the interrogatories are largely irrelevant, incomplete, or evasive and
10 non-responsive and that Mr. Morrow failed to answer questions directly in “feigning
11 an ability to understand, pleading ‘deafness’, or simply showing signs of mental
12 incompetency.” (ECF No. 146.)

13 Rule 37 of the Federal Rules of Civil Procedure provides that a party who fails
14 to attend a deposition or answer interrogatories may be subject to sanctions. These
15 sanctions can include monetary sanctions, as well as (i) directing that designated facts
16 be taken as established or (ii) prohibiting the disobeying party from supporting or
17 opposing designated claims or defenses or from introducing designated matters at the
18 trial. Fed. R. Civ. P. 37(b)(2)(A). The sanctions can also include dismissal of the
19 action. *Id.*

20 However, “Rule 37(b)(2) requires that ‘any sanction [imposed pursuant to it]
21 must be just.’ ” *Fjelstad v. Am. Honda Motor Co., Inc.*, 762 F.2d 1334, 1340 (9th
22 Cir. 1985) (alteration in original) (quoting *Ins. Corp. of Ireland v. Compagnie des*
23 *Bauxites de Guinee*, 456 U.S. 694, 707 (1982)). Thus, given its severity, the sanction
24 of “[d]ismissal . . . is authorized only in ‘extreme circumstances’ and only where the
25 violation is ‘due to willfulness, bad faith, or fault of the party.’ ” *In re Exxon Valdez*,
26 102 F.3d 429, 432 (9th Cir. 1996) (quoting *United States v. Kahaluu Const.*, 857 F.2d
27 600, 603 (9th Cir. 1988)).
28

1 Although Plaintiffs' responses are certainly not a paragon of clarity and may
2 warrant limiting their ability to introduce evidence at trial, the City fails to show
3 extreme circumstances and that the unclear responses are the result of willfulness,
4 bad faith, or fault. Therefore, the Court finds that the ultimate sanction of dismissal
5 is not appropriate in this case.

6 7 **III. RULE 12(c)**

8 The City finally moves, pursuant to Rule 12(c) of the Federal Rules of Civil
9 Procedure, for judgment on the pleadings. The City argues that Plaintiffs fail to
10 allege sufficient facts for a "class of one" equal protection claim.¹

11 "Judgment on the pleadings [pursuant to Rule 12(c)] is properly granted when
12 there is no issue of material fact in dispute and the moving party is entitled to
13 judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).
14 The court "must accept all factual allegations in the complaint as true and construe
15 them in the light most favorable to the non-moving party." *Id.* A motion for
16 judgment on the pleadings faces the same test as a motion under Rule 12(b)(6): the
17 district court may dismiss "only if it is clear that no relief could be granted under any
18 set of facts that could be proven consistent with the allegations." *McGlinchy v. Shell*
19 *Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

20 "The Equal Protection Clause ensures that 'all persons similarly situated
21 should be treated alike.' " *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944
22 (9th Cir. 2004) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439
23 (1985)), *overruled on other grounds by Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528
24 (2005). "The equal protection guarantee protects not only groups, but individuals
25 who would constitute a 'class of one.' " *Id.* (citing *Vill. of Willowbrook v. Olech*, 528
26 U.S. 562, 564 (2000)). Where state action does not implicate a fundamental right or
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28 ¹ The City argues that Plaintiffs also fail to state a class claim. The Court has already denied Plaintiffs' Motion for Class Certification, so the Court need not address this argument.

1 a suspect classification, plaintiffs can establish a “class of one” equal protection claim
2 by showing that they have “been intentionally treated differently from others
3 similarly situated and that there is no rational basis for the difference in treatment.”
4 *Id.* “Where an equal protection claim is based on ‘selective enforcement of valid
5 laws,’ a plaintiff can show that the defendants’ rational basis for selectively enforcing
6 the law is a pretext for ‘an impermissible motive.’ ” *Id.* (quoting *Freeman v. City of*
7 *Santa Ana*, 68 F.3d 1180, 1187–88 (9th Cir. 1995)). However, “[d]isparate
8 government treatment will survive a rational basis scrutiny as long as it bears a
9 rational relation to a legitimate state interest.” *Id.* (internal quotation marks omitted).

10 In this case, Plaintiffs allege that the City targets residents for “proactive
11 enforcement” only in low-income census tracts. (Fourth Amended Complaint
12 (“4AC”) ¶¶ 97, 98, ECF No. 47.) Plaintiffs claim this selective enforcement against
13 those in low-income census tracts is done with discriminatory purpose because low-
14 income tract residents “would be the least likely to be able to challenge Defendants’
15 conduct and would be [the] most likely to be forced to pay fines and penalties and/or
16 lose and/or surrender their homes.” (*Id.* ¶ 105.) Plaintiffs allege that the cost of
17 challenging the City’s citations is often prohibitively expensive, and thus the City
18 targets residents who cannot afford these expenses to generate revenue. (*Id.* ¶¶ 105,
19 107).


20 The City argues these allegations do not give it fair notice of the claim the
21 Plaintiffs are asserting. The City attempts to introduce Plaintiff Floyd Morrow’s
22 testimony in support of its argument. The Court is unpersuaded. The claim in the
23 Fourth Amended Complaint is sufficient to give the City notice of the grounds for
24 the claim, and the City’s use of Mr. Morrow’s testimony is not appropriate in a
25 motion for judgment on the pleadings. If the City wishes to rely on evidence outside
26 the Complaint, it should bring a motion for summary judgment, but its request to
27 adjudicate Plaintiffs’ claim under Rule 12(c) is not well founded.
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1 **IV. CONCLUSION**

2 For the reasons stated above, the Court **DENIES** the City's Motion to Dismiss.
3 (ECF No. 146).

4 **IT IS SO ORDERED.**

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6 **DATED: June 5, 2017**


7 **Hon. Cynthia Bashant**
8 **United States District Judge**
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